



June 21, 1999

Mr. Paul Sarahan
Director Litigation Division
Texas Natural Resource Conservation Commission
P.O. Box 12087
Austin, Texas 78711-3087

OR99-1698

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 125104.

The Texas Natural Resource Conservation Commission (the "commission") received an open records request for "all enforcement documents . . . and all EPA correspondence" concerning Supreme Beef Packers. You state that the commission will make available to the requestor some responsive information. You seek to withhold certain documents, however, pursuant to sections 552.107(1) and 552.111 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. *See* Open Records Decision No. 574 (1990). Accordingly, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. We have marked the documents, or portions thereof, that the commission may withhold from the public pursuant to section 552.107(1).

You next contend that some of the documents you submitted to this office are excepted from required public disclosure pursuant to section 552.111 of the Government Code as attorney work product. The first requirement that must be met to consider information "attorney work product" is that the information must have been created for trial or in anticipation of litigation. The second requirement that must be met is that the work product "consists of or tends to reveal the thought processes of an attorney in the civil litigation process." Open

Records Decision No. 647 at 4 (1996). All of the information you seek to withhold pertains to an enforcement action by the commission against Supreme Meat Packers. After reviewing your arguments, we conclude that you have met your burden of establishing that the information you have marked constitutes attorney work product. Accordingly, the commission may withhold such information pursuant to section 552.111.

You also contend that the contents of some of the records at issue may be withheld from the public as "interagency or intra-agency memoranda" and draft documents protected under section 552.111. Section 552.111 excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process.¹ Open Records Decision No. 615 at 5 (1993). The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). In Open Records Decision No. 615 at 5, this office held that

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters [Emphasis in original.]

We agree that the memoranda, or portions thereof, consist of advice, opinion, or recommendation protected by section 552.111. We have marked these documents accordingly.

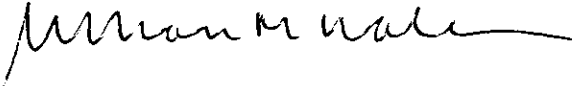
Additionally, in Open Records Decision No. 559 (1990), this office held that a preliminary draft of a document *that is intended for release in a final form* necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document and as such may be withheld pursuant to the predecessor of section 552.111. The draft documents before us directly pertain to policy matters concerning the commission. Assuming that these documents in fact are released to the public in their final form, we conclude that the commission may withhold these and similar draft documents coming within the ambit of the current open records request in their entirety pursuant to section 552.111.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts

¹Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 at 5.

presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read "William M. Walker", with a long horizontal flourish extending to the right.

William M. Walker
Assistant Attorney General
Open Records Division

WMW/RWP/eaf

Ref.: ID# 125104

Encl: Marked documents

cc: Ms. Suzanne Clarke
Natural Resources News Service
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Washington, DC 20036
(w/o enclosures)